

Hoi (Migration) [2019] AATA 4449 (17 July 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Shin Yean Hoi Ziu Yie Hoi
CASE NUMBER:	1721048
DIBP REFERENCE(S):	BCC2017/2361071
MEMBER:	P. Wood
DATE:	17 July 2019
PLACE OF DECISION:	Melbourne, Victoria
DECISION:	The Tribunal affirms the decision to cancel the first named applicant's Subclass 572 Vocational Education and Training Sector visa. The Tribunal has no jurisdiction with respect to the other applicant.

Statement made on 17 July 2019 at 3:48pm

CATCHWORDS

MIGRATION – cancellation – Student (Temporary) (Class TU) visas – Subclass 572 Vocational Education and Training Sector visa – Public Interest Criterion 4020 – bogus document – fraudulent passport – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 107, 109
Migration Regulations 1994, r 2.41

CASES

MIAC v Khadgi (2010) 190 FCR 248

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 1 September 2017 to cancel the first named applicant's Subclass 572 Vocational Education and Training Sector visa under s.109(1) of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa on the basis that the first named applicant obtained a visa under a false name. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. For the purposes of the Tribunal's jurisdiction, the only decision that is before the Tribunal is that with respect to the first named applicant.
4. The first named applicant was invited to appear before the Tribunal on 8 July 2019 to give evidence and present arguments but did not attend.
5. The first named applicant provided the Tribunal with a copy of the delegate's decision record dated 1 September 2017.
6. For the following reasons, the Tribunal has concluded that the decision to cancel the first named applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
8. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
9. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

10. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled.
11. The non-compliance identified and particularised in the s.107 notice was non-compliance with s.101(b) and s.103 of Subdivision C in the following respects:

12. Section 101 A non-citizen must fill in or complete his or her application form in such a way that:

13. (b) no incorrect answers are given or provided

14. Section 103: A non-citizen must not give, present or provide to an officer, an authorised system, the Minister, or a tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented or provided.

15. For the purpose of Subdivision C of the Act, 'bogus document' is defined at s.5 of the Act as follows:

16. Bogus document

17. In relation to a person means, a document that the Minister reasonably suspects is a document that:

- a) purports to have been but was not, issued in respect of the person; or
- b) is counterfeit or has been altered by a person who does not have authority to do so; or
- c) was obtained because of a false or misleading statement, whether or not made knowingly.

18. The non-compliance identified and particularised in the s.107 notice occurred when:

- In his application for a Subclass TU 572 visa, the first named applicant gave the name Shin Yean Hoi and date of birth 3 June 1979 when his true name is Chun Kean Ooi and his correct date of birth is 23 June 1979.
- With the before mentioned application, the applicant provided a fraudulent passport, number A37597860.

19. For these reasons, the Tribunal finds that there was non-compliance with s.101(b) and s.103 by the applicant in the way described in the s.107 notice.

Should the visa be cancelled?

20. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).

21. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. Briefly, they are:

- the correct information
 - the content of the genuine document (if any)
 - whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document
 - the circumstances in which the non-compliance occurred
 - the present circumstances of the visa holder
 - the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act
 - any other instances of non-compliance by the visa holder known to the Minister
 - the time that has elapsed since the non-compliance
 - any breaches of the law since the non-compliance and the seriousness of those breaches
 - any contribution made by the holder to the community.
22. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedures Advice Manual, PAM3 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.
23. *The correct information*
24. The correct information is that the applicant's name is Chun Kean Ooi and his date of birth is 23 June 1979. As the applicant was subject to a three-year exclusion period, the Tribunal considers that the applicant has provided a false name and bogus document (in the form of the false passport) in order to avoid being identified as Chun Kean Ooi.
25. In these circumstances, the Tribunal gives this consideration significant weight in favour of exercising the discretion to cancel the visa.
26. *Whether the decision to grant a visa was based, wholly or partly, on incorrect information or a bogus document*
27. The applicant provided a false name and a fraudulent document in his application for the Subclass 572 Vocational Education and Training Sector visa. The visa was granted, at least partially, on incorrect information.
28. In these circumstances, the Tribunal gives this consideration significant weight in favour of exercising the discretion to cancel the visa.
29. *The content of the genuine document (if any)*
30. This is not relevant in this case.
31. *The circumstances in which the non-compliance occurred*

32. The non-compliance occurred in the applicant's application for the Subclass 572 Vocational Education and Training Sector visa. The Tribunal considers the non-compliance occurred in order to circumvent Australia's migration laws as the applicant was subject to a three-year exclusion period which prevented him from making an application of the kind which he did.

33. In these circumstances, the Tribunal gives this consideration significant weight in favour of exercising the discretion to cancel the visa.

34. The present circumstances of the visa holder

35. The applicant did not respond to the Notice of Intention to Consider Cancellation. He also did not provide any further information after applying to the Tribunal on 8 September 2017. Similarly, the applicant did not provide a response to the Tribunal's invitation to attend the hearing, or attend the hearing itself. Accordingly, the Tribunal has proceeded after considering the information within the Department and Tribunal but cannot be satisfied as to the present circumstances of the visa holder.

36. In these circumstances, the Tribunal gives this consideration no weight in favour of exercising the discretion to cancel the visa.

37. The subsequent behaviour of the visa holder concerning their obligations under Subdivision C of Division 3 of Part 2 of the Act

38. Nothing adverse is known about the applicant's subsequent behaviour concerning these obligations.

39. In these circumstances, the Tribunal gives this consideration no weight in favour of exercising the discretion to cancel the visa.

40. Any other instances of non-compliance by the visa holder

41. Chun Kean Ooi was an unlawful non-citizen in Australia between 20 February 2014 and 19 March 2016. No explanation for this has been provided to the Tribunal.

42. In these circumstances, the Tribunal gives this consideration significant weight in favour of exercising the discretion to cancel the visa.

43. The time that has elapsed since non-compliance

44. In this case the first named applicant has gained entry to Australia by providing false information concerning a current and previous visa application.

45. The applicant provided a false name and a fraudulent document in his application for the Subclass 572 Vocational Education and Training Sector visa which was granted on 24 June 2016.

46. As the non-compliance occurred relatively recently, the Tribunal gives this consideration some weight in favour of exercising the discretion to cancel the visa.

47. Any breaches of the law since the non-compliance and the seriousness of those breaches

48. The Tribunal is not aware of any breaches of the law since the non-compliance.

49. In these circumstances, the Tribunal gives this consideration no weight in favour of exercising the discretion to cancel the visa.

50. *Any contribution made by the visa holder to the community*

51. The applicant has not made any claim in this respect.

52. In these circumstances, the Tribunal gives this consideration no weight in favour of exercising the discretion to cancel the visa.

53. *Whether there are persons in Australia whose visas would, or may, be cancelled consequentially*

54. The visa of the applicant's young daughter was automatically cancelled as a consequence of cancellation, not by a decision but by force of the operation of s.140(1) of the Act. As no decision was involved in the visa cancellation under s.140(1), the Tribunal has no jurisdiction with respect to her visa. Notwithstanding this, the Tribunal does not consider the applicant having to relocate his daughter to his home country is unreasonable (to him or her) given the circumstances, which involve migration fraud.

55. In these circumstances, the Tribunal gives this consideration no weight in favour of exercising the discretion to cancel the visa.

56. *Whether Australia has obligations under relevant international agreements that would or may be breached as a result of the visa cancellation*

57. The Tribunal has had regard to the Convention on the Rights of the Child (CROC) and the International Covenant on Civil and Political Rights (ICCPR). Article 3.1 of the CROC provides:

58. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

59. The Tribunal does not consider that cancellation of the applicant's visa would unavoidably separate him from his daughter. This is because the applicant and his daughter are presumably able to be together in their home country.

60. In these circumstances, the Tribunal gives this consideration no weight in favour of exercising the discretion to cancel the visa.

61. *Whether there are mandatory legal consequences to a cancellation decision*

62. Regarding mandatory legal consequences of a decision to cancel the visa, there is evidence before the Tribunal that the applicant would be barred for a three-year period from having any new application for most temporary visas approved. He would also be barred under s.48 of the Act for applying for certain visas onshore.

63. The Tribunal acknowledges that the possible cancellation of the applicant's visa may have specific legal consequences for the applicant. These could include making the applicant and his daughter unlawful non-citizens and liable to detention under s.189 and removal under s.198 of the Act.

64. Whilst the Tribunal finds these potential consequences weigh against exercising the discretion to cancel the visa, these consequences would or should have been known to the applicant, particularly where the Tribunal has found the circumstances leading to cancellation were entirely the making of the applicant and therefore the Tribunal gives this consideration minimal weight.

65. The Tribunal has no evidence as to whether any hardship may be caused to the visa holder or any of his family members.
66. The Tribunal has considered the factors identified by the legislation and policy as well as the evidence available in relation to the applicant's circumstances and has decided to exercise its discretion to cancel the visa.
67. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should be cancelled.

DECISION

68. The Tribunal affirms the decision to cancel the first named applicant's Subclass 572 Vocational Education and Training Sector visa.
69. The Tribunal has no jurisdiction with respect to the other applicant.

P. Wood
Senior Member

ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

102 Passenger cards to be correct

A non-citizen must fill in his or her passenger card in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given.

103 Bogus documents not to be given etc.

A non-citizen must not give, present, [produce]** or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, [produced]¹ or provided.

* This wording applies to documents given, presented, produced or provided on or after 4 November 2014: Schedule 7 to *Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (No.116, 2014).

¹

104 Changes in circumstances to be notified

- (1) If circumstances change so that an answer to a question on a non-citizen's application form or an answer under this section is incorrect in the new circumstances, he or she must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in them.
- (2) If the applicant is in Australia at the time the visa is granted, subsection (1) only applies to changes in circumstance before the visa is granted.
- (3) If the applicant is outside Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances after the application and before the applicant is immigration cleared.
- (4) Subsection (1) applies despite the grant of any visa.

105 Particulars of incorrect answers to be given

- (1) If a non-citizen becomes aware that:
 - (a) an answer given or provided in his or her application form; or
 - (b) an answer given in his or her passenger card; or
 - (c) information given by him or her under section 104 about the form or card; or
 - (d) a response given by him or her under section 107;was incorrect when it was given or provided, he or she must, as soon as practicable, notify an officer in writing of the incorrectness and of the correct answer.
- (2) Subsection (1) applies despite the grant of any visa.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
 - (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
 - (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
 - (d) setting out the effect of sections 108, 109, 111 and 112; and
 - (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
 - (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.

- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
- (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
- (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
- may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.